SUPREME COURT OF THE UNITED STATES.

SECURITY TRUST COMPANY,
As Administrator of the Estate of Sumner W. Matteson, Deceased,
Plaintiff in Error,

vs.

WILLIAM H. DENT,
As Receiver of the First National Bank of Decorah,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

ADDITION TO STATEMENT OF PLAINTIFF IN ERROR.

To the statement made on the first three pages of the brief of plaintiff in error, we desire to add, that the promissory notes upon which action was brought in the circuit court and set forth in full in the printed record herein, were contracts made and to be performed outside of the State of Minnesota, being contracts made in the State of Iowa and to be performed in the State of Iowa; that

probate proceedings were instituted in the State of Iowa shortly after proceedings were instituted in Minnesota; were ancillary to the proceedings in Minnesota; were pending during the time of the proceeding, set forth in the printed record of the probate court herein, and are now pending; that Charles D. Matteson, the secretary of the plaintiff in error is administrator of the estate of said Sumner W. Matteson in Iowa.

The administrator was never discharged by order, judgment or decree of the probate court and there was no record or file in the probate court at the time of the commencement of this action showing that it had complied with the order of distribution.

As to the statement on the fourth page, concerning the opinion of the trial court, we are in doubt as to the correctness thereof, for the reason that the trial court made only a general order for judgment and did not state upon what grounds it awarded judgment in favor of defendant in error.

Defendant in error insisted in the circuit court and also in the circuit court of appeals that, the order of the judge of the probate court has not the force and effect of a statute law.

ARGUMENT.

I.

As we understand the position of plaintiff in error, it is,

First, that the allowance of the account of an administrator and entry of a decree of distribution, *ipso facto*, discharges the administrator, terminates his trust, and suit cannot be thereafter maintained against such administrator;

Second, that, while the federal courts have jurisdiction of the claims against deceased persons, divers citizenship being shown, such jurisdiction must be acquired within the time prescribed by the judge of probate for the presentation of claims in the probate court under the state law;

Third, that such order of the probate court has the full force and effect of a statute of limitations, and that the failure to present claims to the probate court or to bring suit in the federal court within the time limited by the probate court for the filing of claims in said court, bars any action on said claims against the administrator, in the federal court;

Fourth, inferentially, that no action will lie against an administrator in the federal court, unless the claim is first filed in the probate court, appealed to the district court of the state and then removed to the federal court.

Defendant in error contends for the converse of these propositions.

We wish to define clearly the position of defendant in error in prosecuting these actions at law.

We do not contend that the right exists, by virtue of the judgment entered herein, to interfere with the possession of the property belonging to said estate while in possession of the probate court of the state, and we concede that, so long as the property of the estate remains under the jurisdiction and control of the probate court, it is not subject to interference by levy under execution or otherwise, or any process issued out of this court, but that application must be made to the probate court for payment of such judgment. The question is simply "debt or no debt," and that is all the judgment herein adjudicates. If payment is sought, application must be made to the probate court to reach funds under the jurisdiction of the probate court; or, if the property has passed from the jurisdiction of the probate court into the hands of the distributees, then it can be recovered from such distributees only by a proper action in equity and in a manner which will not disturb the possession of the property under the jurisdiction of the probate court.

In other words, the position of defendant in error is that this action is for the purpose of obtaining a judgment payable *de bonis testatoris* for the purpose of arresting the property in the hands of the administrator before it shall be distributed to the heirs at law, and, if sufficient property be not found in the hands of the administrator, that it shall

constitute a foundation for an action in equity, in the event that such action becomes necessary for the payment of the claim of defendant in error.

As we understand the law, it was necessary for defendant in error to exhaust his legal remedy before he could maintain an action in equity against the distributees. (*Walker vs. Brown*, 63 Federal Reporter, 204.) But he was not compelled to postpone the institution of his action at law until all of the personal property had passed from the administrator to such distributees.

At the time of the commencement of the action in the circuit court, so far as the records of the probate court show or it could be ascertained, the administrator was in possession still of all of the personal property belonging to said estate,—an amount far in excess of that required to satisfy the claim of defendant in error,—and had action in equity been brought (if such action would lie while an action at law would be efficacious) the right to resort to said personal property would be waived, for the reason that, if the administrator was, as the records of the court show, in possession of the property, an action would not lie against the distributees who had not received it.

Just what is the contention of plaintiff in error as to the right of action in the federal court, we find it difficult to determine, for, while plaintiff in one paragraph of his brief asserts that he does not

deny the right of defendant in error to sue in the federal courts to establish this claim and does not deny that the method of procedure must be the same as in other actions at law brought in the federal court, the only logical conclusion to be drawn from pages 36, 37, 38 and 39 of brief of plaintiff in error is that the circuit court could acquire no jurisdiction whatsoever. Even on the theory that it concedes that the federal court has jurisdiction, it denies there exists any remedy whatsoever.

Prior to *State ex rel, Matteson vs. Probate Court*, 87 N. W. Rep. 783, the supreme court of the State of Minnesota had held no further than that the effect of a decree of distribution was only the settlement of the administrator's account and the assignment of the property to the heirs. Beyond this the court had not gone. It is true there are some loose expressions in two of the decisions of our supreme court which, as disconnected utterances, might be some basis for the assertions of the plaintiff in error; but, when construed in connection with the issues involved in the case, they will not bear the interpretation sought to be placed upon them.

At common law, the office of the administrator does not terminate during his lifetime, unless he be removed by a court of competent jurisdiction; and, while it is the aim of American legislation to make the office a temporary one, closing

with the accomplishment of the purpose for which it was created, we believe that specific and positive legislation is necessary to clothe the probate court with power to enter a decree discharging an administrator, and this we believe is true whether such probate court is a court created by constitution or by act of legislature. The distribution of the assets of an estate, and divesting the probate court of jurisdiction over the property, is a far different thing from the discharge of an administrator. Until such decree is lawfully entered by the probate court discharging an administrator from further liability and such decree is in pursuance of a statute authorizing the same, the trust continues, in contemplation of law, and the administrator remains clothed with the duties and authorities of his office. *Vol. 2, American Law of Administration*, pages 1255-6-7; sections 251-2-3. A few only of the states of the Union have enacted provisions for the discharge of administrators. It is conceded that there is no such provision in the statutes of Minnesota. California has such provision and, in substance, provides that when the estate has been fully administered and it shall properly appear that the executor shall have paid all sums of money due from him, "the court shall make a decree discharging him from all liability to be incurred thereafter."

In *McCrea vs. Haraszthy*, 51 Cal. 146, the Court say:

"No such decree appears to have been made by the probate court. The mere allowance of the final decree appearing to have been made, obviously, is not the legal equivalent of such decree. Such an account allowed does not even import all the conditions presented by the statute as prerequisite of a decree discharging the executor and terminating hist trust. But if it did, the decree duly entered would still be necessary for that purpose. Until the entry of such a decree, the trust still continues in contemplation of law and the executor remains clothed with the duty and authority of his office. Nor is any decree of distribution shown to have been entered in the probate court. The allowance of the final account of the executor is not a decree of distribution, or the legal equivalent of such a decree, and this for the reason already mentioned in reference to a decree in terms discharging the executor from his trust."

See, also,

Dohs vs. Dohs, 60 Cal., 255.

On page 1256, American Law of Administration, after saying that some probate courts have entered orders discharging administrators or executors in the absence of a statute authorizing such order, the author continues:

"However consistent such ruling may be with the spirit of the system of administration, it is not quite clear that either a final settlement after a discharge by the Court or an order of discharge not authorized by statute can relieve an executor or administrator of the duty imposed upon him by law of collecting assets discovered after final settlement and administering them by payment to creditors, legatees or distributees, or protect him against liability for assets concealed by him and not accounted for in his inventory or settlement, until a decree is entered by the probate court dis-

charging him from further liability, in pursuance of a statute authorizing such decree, the trust continues in contemplation of law, and he remains clothed with the duties and authority of his office."

It is conceded that no order, judgment or decree was ever entered in the probate court discharging the defendant as administrator of the estate of Matteson, further than the order of distribution and the settlement of the administrator's account.

In

Silzman et al. vs. Pacquette et al., 13 Wisconsin 325,

it appears that letters of administration were issued to H. L. Dousman and Joseph Pacquette in the estate of Pierre Pacquette, deceased; that thereafter such administrators filed petition in the probate court in Wisconsin stating that they had duly administered upon said estate, had settled and adjusted the personal estate belonging to the deceased, and had distributed the moneys arising therefrom among the creditors, praying that their accounts might be settled and that they be discharged from their trust as administrators. An order of the court was entered, in which it was decreed that, in accordance with their petition, their accounts be accepted and they be discharged from any farther liability or responsibility on account of said estate. This order was entered May 17, 1841. In 1845 Alfred Bronson presented a petition to said probate court stating that, at the request of Dousman, agent of the principal creditor of said estate,

he prayed the court to grant unto him, the said Bronson, letters of administration *de bonis non* of said estate. The petition was granted. Letters of administration *de bonis non* were granted to said Bronson. Thereafter Bronson applied to the Court to sell real estate of which the said Pierre Pacquette died siezed and the sale was made, and thereafter action to recover the land was instituted by the children and heirs at law of Pierre Pacquette, on the ground of invalidity of said sale. There was no provision in the statute of Wisconsin for a decree discharging the administrator, nor was there any provision for the resignation of an administrator, except for certain causes, which causes were not the basis for the discharge of these administrators. While it is true that the decision in this case was rendered upon the ground that no authority existed either in law or by virtue of the facts for the appointment of the administrator *de bonis non*, yet the entire decision is based upon the theory that an administrator once appointed remained in the exercise of his trust unless discharged by the decree of the probate court appointing him, under authority of the statue providing for the entry of such decree. The administrator was discharged by order of the court, yet the court held the decree void, and the sale made by the administrator *de bonis non* of no effect.

The gist of the decision is contained on page 340, in the following words:

"No rule is better settled than that these courts derive their powers from the statute, and can exercise none except those which the statute gives, and that, so far as acquiring jurisdiction over the subject-matter is concerned, the statute must be strictly complied with. In the language of the Court of Appeals, *Simpel vs. Waffel*, 16 N. Y. 185, 'these principles are elementary, and no citation of authority to sustain them is necessary.'"

While the probate court may have divested itself of its jurisdiction over the property of the estate by the entry of the decree of distribution, yet, from the statement of facts in the case at bar, it was plainly the view of the probate court of Ramsey County, and also of the administrator, that the administrator was not discharged by the settlement of his account and the decree of distribution, for, after the entry thereof, a claim against the estate was allowed by the administrator and was paid, and long subsequent to the entry of such order, property was discovered which was not included in the inventory of the estate, or in the so-called decree of distribution, and a petition was made to the Court to include such property. The petition was entertained and the Court made its order amending its decree of distribution in order that the description of the after-discovered property might be inserted therein. Both the Court and the administrator, therefore, continued in the exercise of a jurisdiction over this estate until very near to the time of the commencement of this action, and thereafter, the administrator assigned stocks and bonds, as such administrator.

There is not a record of the court to show that the order of the court in the final distribution of the estate was ever complied with on behalf of the administrator, and, we submit that the action of both court and administrator shows that neither interpreted, or for a moment thought, that the final decree, so-called, terminated the trust imposed upon such administrator.

Schmidt vs. Stark, 61 Minnesota 91, is cited by counsel as holding that the administrator is discharged by virtue of the entry of a decree of distribution. The gist of that decision is, "if *such action* is necessary resort must be had to some other forum, for the probate court has no further jurisdiction." The Court does not here refer to jurisdiction of the person of the administrator, but jurisdiction over the property, as is clearly indicated in the first portion of the decision.

An order of distribution in nowise terminates the life of the administrator, for, under section 4532, there may be several distributions. 4532 is as follows:

"Further Orders of Distribution, When.—If the whole of the debts and legacies are not paid by the first distribution and if the whole assets have not been distributed, or if other assets afterwards come to the hands of the executor or administrator, the probate court may from time to time make further orders for the distribution of assets."

The Court, in the case last above cited, say: "If an *action* is necessary"—but no action can be com-

menced or maintained in the probate court; proceedings may be instituted to call an administrator to account for disobedience to the order of the Court; but this is in no sense an action. The entry of an order of distribution does not terminate the jurisdiction of the probate court over the administrator, but there vests continuously in the probate court power to discipline its officers and those within its jurisdiction for refusal to obey its proper orders and its lawful decrees.

The vice of plaintiff's position is that it assumes that because an *action* will lie in the district court, that therefore the administrator is absolved from all obligation to the probate court. The supreme court of this state has never said, except in 87 *N. W. Rep.* above cited, that the probate court is without authority to compel obedience to its orders and its decrees or to impose a penalty for refusal to comply with such orders and decrees. In the case cited, the supreme court held that the district court did not have jurisdiction of the cause of action, because the estate was not fully administered and it would not usurp the powers of the probate court in the administration of estates; and in the case at bar the circuit court finds as a fact, which finding the circuit court of appeals sustains, that the estate herein was not fully settled and the administrator was not discharged. Other reasons are apparent why the administrator is not discharged by an order of distribution, independent of the express provision of section 4532. Under the statutes of

Minnesota the homestead and household property are exempt from the liens of debts of the decedent. Suppose claims should be filed and allowed against the estate largely in excess of the exempt property and the creditors should receive ten per cent. only of their claims, and afterwards large assets of the estate should be discovered, sufficient, and more than sufficient, to pay all claims in full! Under the contention of counsel for plaintiff in error, there is no administrator in existence; the after-discovered funds are freed from the trusts imposed upon them for the payment of the indebtedness of the estate, and the heirs at law, under an order of distribution, receive all such funds and the creditors receive nothing. It would seem to us that the injustice wrought by the application of such a theory is a demonstration of its unsoundness.

Davis vs. Weed, 7 Fed. Cases (No. 3658)—a Connecticut case. The Court say:

"It may be urged that the administrator, having settled his administrator's account and having distributed the estate, is *functus officio*, and that it is necessary to apply to the probate court for the appointment of a new administrator. Distribution, as has been said, does not necessarily exhaust the administrator's powers. If he is living, he is still the representative of the estate, and if he is competent and willing to act there is no necessity for a new appointment. He has not ceased to be administrator from the fact that his account has been approved and that the estate which was in his hands at the time of the settlement of the accounts has been distributed. If new assets should be discovered, the title would vest in him, and he would be the person to reduce such estate to possession. If

it should be ascertained that a debt theretofore undiscovered was due the estate he is authorized as administrator to commence suit for its recovery."

Under the laws of Iowa, the administrator was discharged. In Connecticut, as in Minnesota, there is no statute authorizing such discharge.

The attention of the Court is called to the fact that in none of the cases cited on pages 14 and 15 of appellant's brief has the supreme court of the State of Minnesota held that the administrator of an estate was discharged by the entry of the decree of distribution, called by appellant the "final decree."

State vs. Probate Court of Sibley Co., 33 Minn. 95, was an application to the district court for a writ of prohibition to the probate court, the probate court having granted a petition to set aside a sale of real estate confirmed by the probate court more than twenty years *after the discharge of the administrator.* The Court held that the land had passed by sale and confirmation out of the jurisdiction of the probate court, saying:

"The question is not one of administration, but of adverse claim to the property, a question which must be determined by some other tribunal than the probate court," and specifically states that the administrator had been discharged.

In *State vs. Probate Court of Ramsey Co.*, 40 Minn. 296, the administrator had been discharged by formal order. Twenty years after the discharge, a petition for the appointment of an administrator *de bonis non* was filed, granted, administrator ap-

pointed and license granted to sell the real property for the payment of claims, the allowance of which, the Supreme Court said, operated as a judgment. All that was at issue and all that the Court held was that the application for license to sell came too late; that the effect of the final decree and discharge of administrator discharged the real estate from the lien of the creditors.

Stackhouse vs. Berryhill 47 Minn. 22.

In this case the question at issue was whether a will could be admitted to probate several years after the administrator had been discharged. The Court admitted the will to probate, saying:

"The effect that the filing and allowance of certified copy (of the will) may have upon the real property situated in the state * * * will remain the subject of future examination."

In *McNamara vs. Casserly*, 61 Minn. 343, the Supreme Court held that the entry of a second decree would annul the decree first entered, substantially overruling that portion of the decision in 47 Minn., page 22.

Schmidt vs. Stark, 61 Minn.,

was an action to recover one-fifth of the property of the estate, on the ground that the probate court had entered a decree awarding to plaintiff an undivided one-fifth of the estate, leaving the remainder of the estate unassigned. The Court dismissed the action on the ground that it could not award plaintiff the possession of the undivided one-fifth of the estate while the estate was in the possession

of the probate court, incidentally saying that, if an *action* should be necessary after the distribution of the estate, such action must be brought in some other forum for the probate court could not have jurisdiction.

In *Ganser vs. Ganser*, 86 N. W. Rep. 18, the language quoted in appellants' brief is from a statement of the facts of the case and not the law applicable to the case, and is in no sense a decision to the effect claimed by appellant, since the only question at issue was, "When does the statute of limitation commence to run on an administrator's bond; at the time of the entry of decree of distribution and when suit might be commenced in the district court, or from the date when leave to sue was granted by the Court?

With reference to the discharge of an administrator by formal order or decree, the supreme court of Minnesota holds (58 Minnesota, 29, *In re Charles Scheffers' Estate*):

"But there must be *some* order or decree which contains the substance of the matter, which shows that the attention of the court was directed to it and that it intended the result claimed. *That must appear with certainty beyond mere conjecture.*"

But the circuit court and circuit court of appeals both found and held that the order of distribution was *not* intended by the probate court to be a discharge of the administrator. Can it, therefore, be reasonably claimed that it "appears with certainty"?

The last case cited on page 15 of appellants'

brief, viz.: *State ex rel. Matteson vs. Probate Court of Ramsey County*, 87 N. W. Rep. 783, does hold that upon the entry of final decree of distribution assigning the whole of the estate, the property is removed from the jurisdiction of the court and the office of administrator is rendered *functus officio.*

Relative to this case we have to say that a *feigned issue was presented to the court for the purpose of forestalling the decision of this court.* The petition was presented to the probate court of Ramsey county after the case at bar was removed from the circuit court of appeals to this court. The relator therein bore no friendly relations to the defendant-in-error herein and sustained most cordial and brotherly relations to the secretary and treasurer of the plaintiff-in-error herein,—Charles D. Matteson, his brother, and who had the whole management of the Matteson estate (see printed record on page 30.)

The position was no different than it would have been had Charles D. Matteson made the petition to the probate court for an accounting which he himself must file as such secretary. Defendant-in-error herein was kept in ignorance of the pendency of said proceedings in both probate and district and supreme courts, and offered no opportunity in any of said courts of intervening or presenting any brief or argument in behalf of said defendant-in-error. Said cause was never on the calendar of any General Term of the District Court,

was entered on the October calendar, A. D. 1901, of the Supreme Court of the State of Minnesota, being No. 180 under title of "*State of Minnesota ex rel. M. Matthews, Relator-Appellant, vs. The Probate Court of Ramsey County.*" Counsel for plaintiff-in-error herein was counsel in said cause for the respondent, the Probate Court of Ramsey County. *Both appellant* and *respondent* in said case were seeking and desirous of obtaining a decree of the Supreme Court of the State of Minnesota of the nature of the decision rendered in said cause for the purpose of forestalling the decision of this court. The issue was feigned and the cause an imposition upon the Supreme Court of the State of Minnesota and obtained under conditions that entitle it to little weight in this court. The writ of *mandamus* was issued to the probate court September 5th, heard by the district court on September 7th; judgment entered on the same day and appeal taken to the Supreme Court of the State on the 11th of September. The Supreme Court convened October 1st and the case was argued October 15th, decision rendered November 1st; all in the year 1901.

The federal courts obtained jurisdiction of the case at bar and all of the issues therein involved, January, 1897, and it seems to us that the language of the Circuit Court of Appeals of the Eighth Circuit, in

Starr et al. vs. Chicago, R. I. & P. R. R. Co. et al., 110 Fed. Rep. 3.

on page 8, is applicable to said case.

"In other words, the effect of these later actions is to toll off to another court the question which has long been and still is properly in litigation here. * * * and forestall and nullify any decision and decree of this court regarding issues of which it first lawfully took jurisdiction. The impropriety and inadmissibility of such a proceeding, in the light of the fundamental rules of our judicial systems, to which we have now adverted, is so manifest that we have no doubt that the learned attorney general, when his attention is once directed to them, will at once perceive the propriety and necessity of suspending all action in other courts involving the unconstitutionality of this law, and the right and duty of this railroad company to reduce its charges to those there prescribed, until this court, which first acquired jurisdiction of the issues and the parties, has finally determined the questions presented. * * * The enforcement of this rule, that the court which first takes jurisdiction must retain and exercise it to the exclusion of all proceedings in other courts until its jurisdiction is exhausted by the final judgment or decree, and by its effective execution, is indispensable to prevent unseemly conflicts between courts and their officers, and "confusion worse confounded."

It is true that the issue between the state court and the federal court in the case last above cited is not at all identical with the proceeding here and the case is not at all identical with the cases at bar and *State ex rel. Matteson vs. Probate Court of Ramsey County;* but the same principle is involved in both and we submit that the decision of the Supreme Court of Minnesota in *State ex rel. Matteson vs. Probate Court of Ramsey County* should receive little, if any, weight by this court in the consideration of this case.

II.

The defense interposed to the action by plaintiff in error is in effect *plene administravit*. Is this any defense to an action to determine the validity of the claim of these creditors against this estate in this court? This action is brought for the purpose of determining only the validity of the claim of these creditors. In *Corington vs. Burns' Administrators*, 1 Dillon, 16, Judge Dillon says:

"This is an ordinary action against the administrator upon the contract of endorsement made by his intestate. The plaintiff seeks simply to judicially establish his claim against the estate. The statute of Missouri in terms declared that any person having a demand against the estate may establish the same by the judgment or decree of some court of record. (Gen. Stat. 1865, 502, et seq.) The right of the plaintiff to bring this action is clear and undisputed. *Payne vs. Hook*, 7 Wall. 425.) Each of the pleas demurred to is, in fact and substance, a common law plea of *plene administravit*, viz.: that the defendant has now no assets, but had, before the commencement of this action, fully administered the same. The demurrer raises the question whether, under the laws of the state of Missouri, the plea of *plene administravit* is a defense, or presents an issue which it is proper to try in an action of this character, to-wit: an action merely to establish the validity and amount of the debt against the estate.

"The modes of the administration of the estates of deceased persons in England and in most of the American states are in many respects very different. In England, if an administrator suffered a judgment to go against him by default, or failed to plead that he had fully administered, such a judgment was held to be a conclusive admission by the administrator that he had assets sufficient to pay it, and in effect bound the administrator

personally, and amounted to an appropriation of such assets to the payment of the judgment. Hence the reason and also the necessity for such a plea.

"Not so, however, here. Whether the administrator does or does not defend, he is not bound personally, and there is no judgment *de bonis propriis*, and no execution against either the goods of the administrator or of the decedent. The judgment simply establishes the debt and orders it to be paid by the administrator in due course of administration. *Armstrong vs. Cooper*, 11 Ill. 560; *Laughlin vs. McDonald*, 1 Mo. 684. Under the laws of Missouri, the administrator is liable only to the extent of the assets received, and for waste and mismanagement. The statute classifies the debts against the estate, and directs the mode and order of payment by the administrator. A judgment such as the plaintiff seeks is no evidence that the administrator had assets or that he has been guilty of any default; and any inquiry of that kind in an action such as the present is entirely collateral, and it does seem to us manifestly improper.

"For the reasons above given, the courts in other states have held, under statutes like that of Missouri, that a plea of *plene administravit* is not a good plea. *Allen & Wf. vs. Bishop's Executors*, 25 Wendell, 414; *Baker's Executors vs. Gainor's Executors*, 17 Wend. 559; *Butler vs. Hempstead's Administrators*, 18 Wend. 666; *Judy vs. Kelley*, 11 Ill. 211.

"In deciding, in the case last cited, that a plea of *plene administravit* is no answer to an action brought against an administrator, upon a debt due by his intestate, Treat, C. J., remarks that such a plea "presents no defense. At common law the failure of an administrator to plead want of assets, or that he had fully administered, operated as an admission on his part that he had assets sufficient to satisfy the demand; and he was afterwards estopped from asserting that he had no as-

sets, or that he had fully administered. Hence the necessity of this class of pleas. The case is different under our statute. * * * A judgment against an administrator only establishes the debt against the estate, to be paid in due course of administration. The creditor is not entitled to execution on his judgment, either against the administrator or the property of the intestate. *Welch vs. Wallace*, 3 Gilm. 490. This change in common law dispenses with the plea of *plene administravit*, and renders it wholly unnecessary. It is in fact no defense to an action against an administrator.

The same reasons obtain in this state. Whether the administrator has or has not assets, has or has not been guilty of waste or mismanagement, are questions which may be hereafter tried, if the plaintiff establishes his debt; but it is premature to try them now and improper to introduce such extraneous issues into this suit."

In *Allen vs. Bishop's Executors*, 25 Wendell, 414, Judge Nelson says:

"There are some sections in the revised statutes which it is impossible to reconcile with the general system prescribed in respect to the settlement of estates of deceased persons. The system itself does not seem to have been fully comprehended by its authors. A pro rata distribution among the creditors of a class in case of deficit in assets is a fundamental principle for the enforcement of which abundant provision has been made. The whole fund is brought under the control of the surrogate, and not a dollar can be touched without his assent. Executors and administrators are but trustees to settle the estate under his direction and control, agreeably to the principles of the statute. Nothing is gained by obtaining a judgment against them beyond liquidation of the debt. The creditor gets no cost except at the discretion of the court, and only his pro rata share of the judgment. The result is the same whether the suit be defended or

not. 18 Wendell, 666; 12 Wendell, 542; 17 Wendell, 559.

"The plea of *plene administravit*, therefore, seems altogether inappropriate and useless. It has already been held in the case last cited above that the plea of *plene administravit praeter* is no longer a bar."

That the estate is not absolutely defunct and that it continues in legal effect to exist for certain purposes, and if so existing the office of administrator also exists, is held in

Matteson vs. Dent, 20 Sup. Ct. Rep., 419.

III.

Plaintiff in error contends that because the action herein was not commenced within the time limited by the probate court for the presentation of claims in that court, that the action is barred by limitation; that the limitation of time within which a claim must be presented to the probate court is a general statute of limitations binding alike upon the state and federal courts.

No statute like that of the State of Minnesota has ever been construed by the federal court, except, possibly, the statute of Wisconsin construed in *Hartman vs. Fishbeck*, 18 Fed. Rep. 29. Section 4511 provides that all claims arising upon contract must be presented to the probate court within the time limited by the judge of probate, and if not so presented are forever barred. Section 4514 pro-

vides that no action at law for the recovery of money shall be brought in any of the courts of the state against any administrator, upon any claim or demand which may be presented to the probate court. The statute, in express terms, prohibits suits in the federal courts. It provides that all claims not presented to the probate court *are forever barred.* The presentation of a claim to the probate court has the same force and effect as the filing of a complaint in a *nisi prius* court. It gives the court jurisdiction of the subject matter of the claim and of the creditor. By presenting his claim to the probate court, the creditor invokes the aid of said court and is bound by its judgment and decree. The procedure in probate court, if a claim is disputed, to try the issue of fact is as formal as in the district court, except that no jury is permitted, and the "allowance or disallowance of any claim shall have the same force and effect as a judgment for or against the estate."

Counsel is in error when he says, on page 33 of his brief, that the presentation of a claim to the probate court for allowance cannot be said to be a suit of a civil nature at common law or in equity; that it does not meet one of the requirements of such suit; that there is no suit until the appeal; that the appeal is the commencement of the suit; that it is only a judicial determination of issues between parties after examination before a court in a proceeding in which the parties have the right to call witnesses and introduce evidence and to be

heard, which it is not competent for the state to confine to its own courts.

Unless counsel means by this that the probate court has exclusive jurisdiction to the exclusion of the federal court, we are unable to fathom his meaning. The practice in the probate courts of this state is well known to counsel. From his long and successful litigation in those courts, counsel will not deny that in every respect, save that of a jury, claims in the probate court are tried as in the district court; parties are heard, witnesses sworn and testify in all respects as in equity cases in the district court.

Counsel's argument before the circuit court of appeals is sounder than his present one. On pages 27 and 28 of his brief before the circuit court of appeals, he says:

"There can be no question that the filing of a claim is the institution of a suit. The statute provides for the hearing (Sec. 4507), taking of evidence and allowance not only of matters of defense but of offsets to the claim (Secs. 4511, 4512), for an order allowing or disallowing the claim (Sec. 4517) which shall have the same force and effect as a judgment for or against the estate (Sec. 4509). Whether it is a suit at law or not, cannot be made to depend upon the name the statute gives to the tribunal nor upon the title used to designate the proceedings. It is a controversy of which the federal courts may have jurisdiction."

On pages 34 and 35 of his brief, counsel likens the procedure in the probate court to a receivership of an insolvent's estate and argues that because a creditor of such insolvent would have no

right to prove his claim by suing the receiver in the federal court, so a creditor of the estate of a deceased person would have no right to sue in any court, and particularly in the federal court, to establish his claim and file the judgment therefor in the probate court. If this is not a denial of the jurisdiction of the federal court, we are unable to understand counsel's meaning.

In answer to such proposition we simply cite the following cases:

Suydam v. Broadnax, 14 Pet. 67, 74, 10 L. Ed. 357;

President, etc., vs. Vaiden, 18 How. 503, 507, 15 L. Ed. 472;

Borer v. Chapman, 119 U. S. 587, 589, 7 Sup. Ct. 342;

Lawrence v. Nelson, 143 U. S. 215, 224, 12 Sup. Ct. 440, 36 L. Ed. 130;

Payne v. Hook, 7 Wall. 425, 430, 19 L. Ed. 260;

Arrowsmith v. Gleason, 129 U. S. 640, 667, 4 Sup. Ct. 237, 32 L. Ed. 630;

Johnson v. Waters, 111 U. S. 557, 570, 13 Sup. Ct. 906, 37 L. Ed. 967;

Hyde v. Stone, 20 How. 170, 175, 15 L. Ed. 874;

Hess v. Reynolds, 113 U. S. 73, 76, 5 Sup. Ct. 377, 28 L. Ed. 927;

Byers vs. McAuley, 13 Sup. Ct. Rep. 906.

As to right of suit in State Court, see *Oswald vs. Pillsbury*, 61 Minn. 520.

But counsel say "if the federal court had jurisdiction then suit must be brought within the time limited by order of the probate court."

Sec. 4509 (printed on page 9 of plaintiff's brief) does not contain a single characteristic of a statute of limitations. It is flexible in its terms, leaving to the probate court to say within what time claims must be presented or be barred in that court, making it discretionary with the court whether the bar may be removed or not and making the limitation depend on conditions and the will of the court, whether it shall be six, twelve or eighteen months.

The legislature has made but one limitation that is definite and concise in its terms, namely: one year and six months from the time when notice of the order is given for the presentation of claims to the probate court. All other limitations are left to the discretion of him who happens to occupy the office of judge of probate. The Supreme Court of Minnesota has said that this section is not to be construed literally, see

Hantzch vs. Massolt, 61 Minn. 366.

The decisions cited in counsel's brief construe the statutes of Missouri, of Arkansas, Nebraska and Rhode Island, which are entirely different from the statute of the State of Minnesota, for the reason that the limitation of time construed in the former is a limitation fixed by act of legislature and is not dependent upon the will or caprice of an individual; is certain and definite and is not flexible, changeable, uncertain and indefinite,—in Missouri,

two years; in Arkansas, two years; in Rhode Island, three years; in Kansas, two years.

On page 28 of brief, counsel say:

"The state has no power over the federal courts, neither to confer nor to take away jurisdiction."

But the claim that a probate judge has the right to say when an action may and may not be barred in the federal court is a usurpation of the power which counsel concedes the state does not possess. The position of counsel, in effect, is that the jurisdiction of the courts of the United States depend on the will and caprice of a judge of probate of any county of the State of Minnesota; that such judge may say to a foreign creditor, "you may bring your action in the United States court if you will, but I will prescribe the time within which you bring it, and the courts of the United States must be submissive to my will." There is no case to be found among the decisions of the federal courts, either Circuit Court, Court of Appeals or Supreme Court of the United States, which has held that such a limitation of time, not by act of legislature but by order of the judge of a lower court, for the convenience of that court, has the force and effect of a statute of limitation upon the courts of the United States.

We do not raise the question (for it is not in the case at bar) that a statute absolute in its terms that domestic contracts must be presented within eighteen months or be barred, is a statute of limitations which must be observed by this court. But

Sec. 4509 makes no limitation by act of legislature, and delegates to an individual to say what shall be a limitation on the presentation of claims. It substitutes for the will of the legislature, the caprice of an individual, and we submit that if the power vests in the legislature to delegate authority to an individual to prescribe six months period for the presentation of claims, domestic or foreign, it may well exercise the same power to limit the presentation of claims to six weeks, and, indeed, since the commencement of this action, said section 4509 has been amended by the legislature of this state by the adoption of the following proviso, viz.:

"Provided, that the judge of probate on proper proof of the affidavit of the executor or administrator that there are no debts against the estate, may limit the time in which creditors may present their claims, to three months."

We think it will not be contended that such a limitation even under the conditions named (that the administrator should present affidavit to the court of no claims existing) would apply to commercial paper running the ordinary time of three, six or nine months, made and to be performed in the city of New York, and that the holder of such paper would be excluded from participation in the distribution of an estate in Minnesota, if his claim was not filed within three months. It would be a most dangerous doctrine, the application of which would in many instances be absolute denial of justice.

As to the binding effect on the federal courts of

the statutes of this character, the best considered cases hold that such statutes have no force or effect on the federal courts, *especially in contracts made and to be performed without the state.*

In

Suydam vs. Broadnax, 14 Peters, 67,

the Court quotes, on page 73, the statutes of Alabama, and says:

"The sixth section declares that 'all claims against the estates of deceased persons shall be presented to the executor or administrator within eighteen months after the same shall have accrued, or within eighteen months after letters have been granted, and not after; and all claims not presented within that time shall be forever barred from recovery,' but excepts, among other exceptions, debts contracted out of Alabama.

"This is a statement which, by the exemption it gives to creditors and administrators from suit, would seem to imply denial to creditors of the intestate the right to sue, without respect to the foreign country or state, in our Union, where the debt was contracted. It is a general statute, without a direct application to contracts made out of Alabama; and its construction cannot be extended to such contracts. A sovereign state, and one of the states of the Union, if the latter were not restrained by constitutional prohibitions, might, by virtue of sovereignty, act upon the contracts of its citizens, wherever made, and discharge them, by denying a right of action upon them in its courts. But the validity of such contracts as were made out of the sovereignty or state, would exist and continue everywhere else, according to the *lex loci contractus*. This shows the reason for and force of the rule just given; and it may be laid down as a safe proposition that a statute discharging contracts or denying suits upon them, without *particular mention of foreign contracts, does not include them.*"

The Court further says that its decision may be put upon other grounds making the conclusion equally certain.

"They are such as are connected with the constitutional and legal rights of plaintiffs to sue in the Circuit Courts of the United States; and upon the law which under our system does not permit an act of insolvency, completely executed under the authority of one state, to be a good bar against the recovery upon a contract made in another state.

"The eleventh section of the act to establish the judicial courts of the United States, carries out the constitutional right of a citizen of one state to sue a citizen of another state in the Circuit Court of the United States; and gives to the Circuit Court 'original cognizance, concurrent with the courts of other states, of all suits of a civil nature, at common law, and in equity.' It was certainly intended to give to suitors having a right to sue in the Circuit Court, remedies co-extensive with these rights. These remedies would not be so, if any proceedings under an act of a state legislature, to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the Circuit Court. * * * It must be remarked, however, that the statute of Alabama is one for the distribution of insolvent estates, not liable to the objections of a general law; and is only brought under cases mentioned, by an attempt to extend its provisions to a citizen of another state. In *Sturgis vs. Crowningshield*, it is said, 'every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are affected are entitled to a hearing. Hence, any bankrupt or insolvent system professes to summon the creditors before some tribunal, to show cause against granting a discharge to the bankrupt. But on what principle can a citizen of another state be forced into the courts of a state for this investigation? The judgment to be passed, is to prostrate his rights; and on the subject of

these rights, the constitution exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract may originate.' In *Ogden vs. Saunders:* 'A bankrupt or insolvent law of any state, which discharges both the person of the debtor and his future acquisitions of property, is not a law impairing the obligations of contracts, so far as respects debts contracted subsequently to the passage of the law. But a certificate of discharge cannot be pleaded in bar of an action brought by a citizen of another state, in the courts of the United States, or of any other state than where the discharge was obtained.'

"Though this is a statute intended to act upon the distribution of insolvent estates, and not a statute of bankruptcy, whatever exemption it may give from suit to an executor or administrator of an insolvent estate against the citizens of Alabama, a citizen of another state, being a creditor of the testator of intestate, cannot be acted upon by any proceedings under the statute, unless he shall have voluntarily made himself a party in them, so as to impair his constitutional and legal right to sue an executor or administrator in the Circuit Court of the United States."

In *Hartman vs. Fishbeck, Admr.*, 18 Fed. 291, the same defense was interposed as in the case at bar. A demurrer was interposed to the answer, namely: that the time limited within which claims of creditors could be presented had expired; that the plaintiff knew of the death of the intestate, but did not present his claim for allowance within the prescribed time, and that he was barred from maintaining the action. The Court says:

"The question to be determined is, Do the facts therein stated constitute any defense to this action? I am clearly of the opinion that they do not, and that the demurrer should be sustained. Un-

doubtedly, in the absence of the statute referred to, the usual common-law rule would be open to the plaintiff and could be enforced against the administrator. To maintain the defendant's contention, it must, therefore, be made to appear that the state statute operates as an abrogation of that remedy, even in the case of a citizen of another state suing in this Court. Such effect cannot be given to the statute. The special course of procedure prescribed by the statute is, of course, effective to bind all citizens of the state, and operates to protect the administrator or executor against suit by such persons. It is also probably true that if a citizen of another state, in a case like this, invokes the aid of the state court in the enforcement of a remedy, he will be remitted to the court having special and exclusive jurisdiction of the subject-matter, and be held subject to the provisions of the statute referred to. *Bank vs. Slater*, 21 Minn. 174. But it is the constitutional right of a citizen of another state, where his demand is adequate in amount, and other prerequisites to jurisdiction exist, to sue in this Court, and that right cannot be affected by the state statutes. In other words, the law of a state limiting the remedies of its own citizens in its own courts cannot be applied to prevent the citizens of other states from suing, in the courts of the United States in that state, for the recovery of any money or property there, to which they may be legally or equitably entitled. *Union Bank of Tenn. vs. Jolly's Admr.*, 18 Howard, 503.

"It is to be observed that the only question here is as to the right of plaintiff to bring this suit, and to prosecute it to judgment in this court; and there is not involved any question of the ultimate course of procedure essential to enforcement of the judgment against the estate, if a judgment shall be recovered. The statute is one which, by the exemption it gives to executors and administrators from suit, would seem to imply a denial to creditors of the intestate of the right to sue without regard to the state of which the creditor may be

a citizen, or where the debt was contracted. *Suydam vs. Broadnax*, 14 Peters, 67.

"But the judiciary act of the United States provides that the Circuit Court shall have original jurisdiction of all suits of a civil nature, at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the suit is between a citizen of the state where it is brought and a citizen of another state; and, as was said by the Court in the case last cited, it was certainly intended by this statute, 'to give to suitors having a right to sue in the Circuit Court, remedies co-extensive with these rights. These remedies would not be so, if any proceedings under an act of a state legislature, to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court.

"The proposition of counsel is correct, that, in the absence of legislation upon the subject by congress, the courts of the United States recognize the statutes of limitation of the several states and give them the same construction and effect as are given them by local tribunals. * * * But it can hardly be contended, I think, that the statute in question creates a limitation to which the rule or principle invoked is applicable. It is not like the general statute of limitations of the state, which, in cases of contract, limits the time of the commencement of an action to six years. Here the statute prescribes a certain course of procedure in connection with the settlement of estates, to be pursued by creditors in the enforcement of their claims. It provides a certain remedy, which is made exclusive in the state. The limitation of time within which, by statute, claims must be presented for allowance in the probate court, is inseparable from the peculiar procedure prescribed. It is part of that procedure, and so not like a general statute of limitations; and as the plaintiff here was not bound to pursue that remedy, but, being a citizen of another state, can sue in the fed-

eral court, he is not affected by a limitation which cannot be separated from the statutory mode of procedure. * * * Citing from *Ry. Co. vs. Whitton*, 13 Wallace, 285, the following language: 'In all cases where a general right is thus conferred, it can be enforced in any federal court having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such federal court by any provision of state legislation that it shall only be enforced in the state court;'" quoting also from *Suydam vs. Broadnax*, *Bank vs. Jolly's Admr.*, and *Payne vs. Hook*, and saying, "Hence, the Circuit Court for any district embracing a particular state will have jurisdiction of an equity proceeding against an administrator, notwithstanding that, by a peculiar structure of the state probate system, such a proceeding could not be maintained in any court of the state."

Referring to and commenting upon *Union Bank of Tenn. vs. Jolly's Administrators*, Mr. Justice Brewer in 27 Fed. 408 says:

"By the laws of the State of Mississippi, when an administrator takes possession of an estate, if he thinks it is insolvent, he may apply to a court, obtain an order, and have notice of insolvency published, and then those creditors that come in and present their claims in this insolvent proceeding share in the assets. *If they do not come in, they do not share.* An administrator taking possession of an estate believed it insolvent, and took the regular proceedings, but when he closed out the estate he had a surplus of six or seven thousand dollars. This claimant had not presented his claim in those proceedings. Now, under the law of Mississippi, the surplus went to the heirs; but the supreme court sustained a bill in favor of this claimant as against the administrator to the extent of the fund in his hands. Well, it is familiar law that a court of equity will follow the assets of an ancestor in the possession of the heir, and apply them to the

payment of the debts of the ancestor. There may be exceptions, but that is the general rule. Now, instead of waiting for the administrator to turn the property over to the heirs, and leaving the claimant to then proceed against them, the court simply intercepted the fund in the possession of the administrator, and awarded it to the claimant creditor."

Excepting only so far as the alleged insolvency of the estate in Mississippi was concerned, we can see no difference in fact or in principle between that case and the case at bar, save only such difference, if there be a difference, as is made by the decision of the Supreme Court of Minnesota in re

State vs. Probate Court of Ramsey County, 78 N. W. Rep.

In

Cluett vs. Morgan, 17 Fed. Rep. 820,

the Court, referring to the cases hereinbefore cited, says:

"From the fact that the failure of complainant to present its claim before the auditors was not treated by the Supreme Court as an absolute bar to its bill, but only as evidence of laches requiring explanation and excuse, we are led to infer that the limitation contained in these acts was not considered applicable to non-resident creditors or pleadable as an ordinary statute of limitations in the federal courts. This inference is strengthened by reference to the earlier cases of *Suydam vs. Broadnax* and *Bank vs. Jolly's Admrs.*, although the question was not squarely presented in either case.

"The whole tenor of these decisions is inconsistent with the idea that foreign creditors are limited in their choice of a forum or subject to other limitations by act. We think the whole enactment should be read together, *and if a non-resi-*

dent creditor is not bound to prove his claim before the probate court, he is not restricted by other limitations of the act requiring all claims to be proven within a limited time. In other words, the limitation is applicable only to such claims as are required to be proven in the manner pointed out by the act. We think, too, that this ruling may be justified upon the broader ground that courts of equity are bound by the statutes of limitations in general only by analogy and may relieve against them in cases of manifest injustice."

While the case of *Hess vs. Reynolds' Admr.*, 113 U. S. 449; 5 Sup. Ct. Rep. 577, was a decision only as to the right of removal to the federal court, it contains this significant language:

"The estate of a decedent is neither a corporation nor a person. It can neither sue nor be sued. It consists of property or rights of property, the title to which passes on his death, with right of possession according to the varying laws of the states, to executors of a will, administrators of estates, heirs or devisees, as the case may be; but neither the principle of convenience nor the statutes of a state can deprive them (the federal courts) of jurisdiction to hear and determine a controversy between citizens of different states, when such a controversy is distinctly presented, because the judgment may affect the administration or distribution in another forum, of the assets of decedent's estate. The controverted question of debt or no debt is one which, if the representative of decedent is a citizen of a different state from that of the other party, the party properly situated has a right, given by the constitution of the United States, to have tried, originally or by removal, in a court of the United States, *which cannot be defeated by state statutes enacted for the more convenient settlement of estates of decedents.*"

It is idle to say that the federal court has jurisdiction to determine controverted questions of debt or no debt, and at the same time to say that while it gives a jurisdiction to determine, it can grant no remedy whatsoever.

And it is the contention of the plaintiff in error that by reason of the statute of the state of Minnesota that the defendant in error is barred of every right. We understand his position to be that, not even an action in equity will lie in the federal court because the Supreme Court of the State of Minnesota has, in construing the statute of the state, held that no action in the state court can be maintained against the devisees or heirs at law, unless the claim was, within the time limited by the probate court, presented to the probate court. As above stated, the only purpose of this action is to establish by judgment of court a debt or no debt. There was no other course for the defendant in error to pursue, because of the recorded proceedings in the probate court. So far as the records of that court show, the administrator was still in possession of all the personal property of the estate. If so, the defendant had a remedy at law and must exhaust that remedy before resorting to a court of equity for the recovery of assets of the estate that had gone into the hands of the heirs at law. It is no concern of the plaintiff in error if the payment not being made, defendant in error should fail in an action in equity against the heirs at law, but, so long as there remain assets in the hands of the

administrator, undistributed, an action in equity would not lie against the heirs at law.

Walter vs. Brown, 63 Fed. 204.

The power of the federal court ceased with the establishment of the demand, unless it becomes necessary to take further action for the purpose of compelling the administrator to recognize the validity of the federal judgment and give to it the force and effect of an adjudicated claim against the estate.

The question of the possession of, or lien upon, or jurisdiction over, the property of the estate is in nowise involved in the case at bar. The only question at issue in the Circuit Court is "*debt or no debt.*"

The plaintiff has no specific lien on the property of the estate, and is not seeking to enforce one. It does not seek to remove the estate from the jurisdiction of the Probate Court. We concede, and always have conceded, that the courts of the United States, in the exercise of their jurisdiction over parties, cannot seize or control the property while in the custody of a court of the state, cannot draw to itself the administration of the estate. And nothing of the sort is attempted in the present case. What is sought is a judgment of the Circuit Court decisive of the issue as to whether the plaintiff has or has not a claim unpaid. That judgment we file in the Probate Court of the state as a claim against the estate, allowed by a court of competent jurisdiction, and to be paid in due course of administration of the estate in the Probate Court. If the bulk

of the estate has been distributed we cannot follow the specific property into the hands of the distributees, but if there is property in the hands of the administrator, we are entitled to have it applied on such judgment. If there is not sufficient property in the hands of the administrator to satisfy the judgment, then, under the statutes of Minnesota, a creditor's bill, after distribution, will lie against the legatees on their liability to apply the assets of the decedent to the payment of his debts. Such estates are impressed with a trust for the payment of the debts of the decedent.

Borer vs. Chapman, 7 Sup. Ct. Rep. 348.

It seems to us that the error which runs through the brief of counsel is the assumption that the Federal Court seeks to infringe upon the statutory rights of the Probate Court and to disturb the possession of the property by the state court. But there is no suggestion that the Federal Court herein take possession of the estate and remove it from the custody of the state court, or interfere in any way with the property of the estate. The contention of counsel seems to be that a lien must be established on the property before it passes from the jurisdiction of the Probate Court or all right is lost; but such is not the holding of this Court in *Borer vs. Chapman*, cited above.

The Court says on page 348, *Vol. 7, Sup. Ct. Rep.*:

"Such estates are impressed with the trust which such creditor had a right to have administered for his benefit. It is upon the ground of such a trust that jurisdiction of the courts of equity primarily

rests in administration suits and in creditors' bills brought against executors or administrators, or, after distribution, against legatees, for the purpose of charging them with a liabilty to apply the assets of the decedent to the payment of his debts. As a part of the ancient and original jurisdiction of courts of equity, it is vested, by the constitution of the United States, and the laws of congress in pursuance thereof, in the Federal Courts, to be administered by Circuit Courts in controversies arising between citizens of different states. It is the familiar and well settled doctrine of this Court that this jurisdiction is independent of that conferred by states upon their own courts and cannot be affected by any legislation except that of the United States." Citing many cases, inclusive of *Payne vs. Hook*, 7 Wallace, 425, and saying:

"In *Payne vs. Hook*, the rule was declared in these words: 'We have repeatedly held that the jurisdiction of courts of the United States over controversies between citizens of different states cannot be impaired by laws of the state which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. If legal remedies are sometimes modified to suit the changes in the laws of the state and the practice of their courts, it is not so with equitable. The equitable jurisdiction conferred on Federal Courts is the same as the high court of chancery in England possess, is subject to neither limitation nor restriction by state legislation and is uniform throughout the different states of the Union.' The only qualification in the application of this principle is that courts of the United States in the exercise of their jurisdiction over the parties cannot seize or control property while in the custody of a court of the state."

Williams vs. Benedict, 8 How. 104.

Yonley vs. Lavender, 21 Wall. 276.

Freeman vs. Howe, 24 How. 450.

In *Byers vs. McAuley*, 13 Sup. Ct. Rep. 906, cited in counsel's brief, after referring to a long line of cases decided in this Court, the Court say:

"In *Yonley vs. Lavender*, 21 Wall. 276, it was held that where the statute of a state places the whole estate, real and personal, of the decedent within the custody of the Probate Court of a county, a non-resident creditor may get a judgment in the Federal Court against the resident executor or administrator, and come in under the law of the state for such payment as that law marshaling the rights of creditors awards to creditors of his class; but he cannot, because he has obtained a judgment in the Federal Court, issue execution, and take precedence of other creditors who have no right to sue in the Federal Courts; and if he do issue execution, and sell the lands, the sale is void. * * * The recovery of judgment gave no prior lien on the property, but simply fixed the status of the party, and compelled the administrator to recognize it in the payment of debts. * * * Possession of the *res* draws to the court having possession all controversies concerning the *res*. If original jurisdiction of the administration of the estates of deceased persons were in the Federal Court, it might, by instituting such an administration, and taking possession of the estate through an administrator appointed by it, draw to itself all controversies affecting that estate, irrespective of the citizenship of the respective parties. But it has no original jurisdiction in respect to the administration of a deceased person. It did not, in this case, assume to take possession of the estate in the first instance; and it cannot, by entertaining jurisdiction of a suit against the administrator, draw to itself the full possession of the estate, or the power of determining all claims against or to it. * * *

"A citizen of another state may establish a debt against the estate (*Yonley vs. Lavender*, *Hess vs. Reynolds*); but the debt thus established must take its place and share of the estate as administered

by the Probate Court, and it cannot be enforced by process directly against the property of the decedent. In like manner, a distributee, citizen of another state, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties (*Payne vs. Hook*) or against any other parties subject to liability (*Borer vs. Chapman*), or in any other way which does not disturb the possession of the property by the state court."

132 U. S. 484, *Rio Grande R. Co. vs. Gomila* (*Vinet*);

10 Sup. Ct. Rep. 155.

goes no further than to hold that the administration of the estate cannot be forced out of the Probate Court and into the Federal Court by any proceeding in the Federal Court. The Court say:

"We do not recall any case now where the Federal Courts have not paid respect to the principle that all debts to be paid out of the decedent's estate are to be established in the court to which the law of his domicile has confided the general administration of estates, and that judgments against the deceased, unaccompanied by a seizure of property for their satisfaction, stand in the same position as other claims against his estate, and are paid in like manner. The jurisdiction of chancery to enforce the equitable rights of a non-resident creditor in the case of maladministration or non-administration of the estate of a decedent stands upon a different principle (*Payne vs. Hook*), the rule prevailing as stated in *Hyde vs. Stone*, 20 How, 170, that the jurisdiction of the courts of the United States over controversies between citizens of different states *cannot be impaired by the laws of the state which prescribe the modes of redress in their courts or which regulate the distribution of their judicial power.*"

See, also, *Arrowsmith vs. Gleason,* 9 Sup. Ct. Rep. 240, 241;

Union Bank vs. Vaiden, 18 Howard, 473, 59 U. S. 507.

The probate court does not possess exclusive jurisdiction of the estates of deceased persons. The jurisdiction of the federal court is concurrent so far as the establishing of the debt is concerned.

Chapman vs. Borer, 1 Fed. Rep. 274.

Hess vs. Reynolds, 113 U. S. 73; 5 Sup. Ct. Rep. 378.

Within the limitation prescribed in *Byer vs. McAuley* and *Hess vs. Reynolds* and other cases cited above, the circuit court may do whatever, at any time, the probate court could have done. If the probate court possessed discretionary powers, so does the federal court. To contend otherwise is to admit a jurisdiction but deny the exercise of any rights thereunder. In the case at bar, the circuit court entertained the action and found in favor of the plaintiff, thus holding that plaintiff had a legal right; if a legal right, the exercise of sound judicial discretion must have awarded plaintiff the privilege of presenting those rights to the court.

IV.

As heretofore stated, the claims on which suit was brought in the circuit court are negotiable promissory notes made and to be performed within the state of Minnesota and held and owned part by a citizen of the state of New York and part by a citizen of the state of Iowa.

An examination of the cases cited in the circuit court of appeals and in the supreme court of the United States in counsel's brief and also in all of the cases cited from the state of Minnesota, will show that all said actions were based on domestic contracts or local causes of action and in none of said cases was the issue raised, nor could it be raised, that foreign commercial paper was not included within the provision of the administration laws of the state, except in *Sugdam vs. Broadnax* and *Borer vs. Chapman*, 7 Sup Ct. 342, the latter case arising in the state of Minnesota, but the court saying that it was not necessary to determine that issue.

In 172 U. S. 358, *M. K. & T. vs. Krumseig*, cited on page 27 of plaintiff's brief, in which the issue was as to whether or not the defense of usury was available in the federal court, it will be noticed from the portion of the decision quoted by counsel in his brief, that the decision of this court limited such right of defense only to contracts made and sought to be performed within the state, and uses this language:

"If the states, whether New York, Arkansas, Minnesota or others, think that the evils of usury are best prevented by making usurious contracts void and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the courts, such a view public policy *in respect to contracts made within the state and sought to be enforced therein*, is obligatory on the federal court, whether acting in equity or at law."

In *Saydam vs. Broadnax*, above cited, this court says:

"The sixth section declares that all claims against the estates of deceased persons shall be presented to the executor or administrator within eighteen months after the same shall have accrued or within eighteen months after letters have been granted and not after, and all claims not presented within that time shall be forever barred from recovery, but excepts, among other exceptions, debts contracted out of Alabama. This is a statement which, by the exemption it gives to creditors and administrators from suit, would seem to imply denial to creditors of the intestate the right to sue without respect to the foreign country or state in our Union where the debt was contracted. It is a general statute without a direct application to contracts made out of Alabama, and its construction cannot be extended to such contracts. The sovereign state, and one of the states of the Union, if the latter were not restrained by constitutional prohibition, might, by virtue of sovereignty, act upon the contract of its citizens wherever made and discharge them by denying a right of action upon them in its courts. But the validity of such contracts as are made out of the sovereignty or state would necessitate a condition everywhere else according to the *lex loci contractus*. This shows the reason for and force of the rule just given, *and it may be laid down as a safe position that a statute discharging contracts or denying suits upon them without particular mention of foreign contracts, does not include them.*"

In *Van Reimsdyke vs. Kane*, 1 Gall. 371, Judge Story says:

"The broad question is whether a discharge under the insolvency laws of a state is a complete discharge of all debts and contracts with whomsoever and wheresoever contracted, so that no action lies therefor in a court of the United States sitting within the state. * * *

"In order to clear the way for a more exact consideration of the question at bar, it may also be necessary to state that every state has within its sovereignty an authority to bind its citizens everywhere, so long as they continue their allegiance. Unless, therefore, it be restrained by constitutional prohibition, it may act upon the contracts between its own citizens in every country, and, consequently, discharge them by general laws. * * * But if a statute be general without a direct application to foreign contracts, the rule approved by Casaregis seems proper to be adopted, that its construction shall not be extended to such contracts. According to the principles, then, which have been stated, if this had been a contract between two citizens or residents of the state of Rhode Island or a contract made and to be executed in Rhode Island, the discharge under the insolvent laws of the state, would be a good bar. Ought it to be a bar, when the contract was made in a foreign country to be executed in a foreign country and between parties, one of whom was not subject to the jurisdiction of Rhode Island? It has been decided that when the contract is made in one state, the discharge in another, and suit is brought in a third state, the action is not barred. But it is contended that a different rule must prevail in the state courts of Rhode Island, and if so, then also in the courts of the United States sitting within the same state. I will consider this question in both respects and first as to the state of Rhode Island. No authority has been shown that decides that no action upon a foreign contract could have been maintained in the state

courts. It is a mere inference from the language of the act which absolves the debtor from "all debts, etc., of every nature and kind whatsoever." But if the rule of Casaregis be correct that, by the true construction of a general statute it ought not to be extended to extra-territorial contracts unless expressly so declared, the question recurs with all its force, because it will not be pretended that the legislature of Rhode Island have made such a positive provision. The general rule is that a discharge of a contract according to the *lex loci contractus* is good everywhere. The rule is founded on public convenience and the courts of nations. It would seem to follow from the same principle, that the discharge under the municipal laws of a foreign state should not affect the validity of such contract. * * *

"If, therefore, the words of that act of insolvency do not necessarily extend (as I think they do not) to foreign contracts, I can entertain no doubt that they would adjudge therein according to that equity which the usage of nations had settled and applied. I hold it to be a legitimate inference from the doctrine established that a contract made in a foreign country * * * cannot be discharged by a positive regulation of any other court to which the parties have not bound themselves to submit. * * * In controversies affecting citizens of other states and in no degree arising from local regulations, as, for instance, *forcign contracts of a commercial nature*, I think it can hardly be maintained that the laws of a state to which they have no reference, however narrow, injudicious and inconvenient they may be, are to be the exclusive guides for judicial decision. Such a construction would defeat nearly all the objects for which the constitution has prescribed a national court."

This court is untrammeled, as was also the lower courts by any judicial construction of the state court, on this issue.

The following cases have been cited by plaintiff in error:

39 Minn. 212. In this case plaintiff sought to file claim in the probate court two years after the closing of the estate and the issue was as to the discretion of the probate court to open a decree after that lapse of time. The supreme court said that the probate court had no such discretion after such a lapse of time, saying:

"While we do not think that a final decree of distribution of itself causes the estate to pass out of the court and beyond its jurisdiction so as to deprive it of the power to set the decree aside if obtained by fraud or erroneously entered by inadvertence, yet it would require a strong case to warrant a court in so doing after the lapse of two years."

47 Minn. 382, *Hill vs. Nichols*, was an action commenced in the district court against the heirs of one Potter on a six months note made by Potter in 1858. Potter died in 1867. His estate was admitted to probate July, 1889, and the administrator discharged by formal decree in 1890. The action was not commenced until a year after such final discharge. The ground on which the supreme court based its decision was that plaintiff having neglected for more than twenty years to take any proceedings to secure an allowance of and to enforce his claim against the estate, lost the right to have it allowed and enforced. He became barred by his own laches. The contract was a local contract.

61 Minn. 366, *Hautzch vs. Massolt*. The question at issue was whether or not a claim was con-

tingent. The claim was based on a guardian's bond given to the judge of probate of Hennepin county, Minnesota—a Minnesota contract. The court held it was a contingent claim, but in construing sections 104, 107, 110, uses the following language:

"If section 104 is construed literally, it would include, not only the plaintiff's claim, but all claims of every kind arising upon contract. Its language is, 'all' claims arising upon contracts, whether the same be due, not due, or contingent. These three classes include all possible claims growing out of contracts. If there are no implied exceptions in this statute as to any class of contingent claims, then, if a person dies who was a stockholder in a corporation, or had conveyed lands by a warranty deed, or signed official bonds as a surety, or given leases for a term of years, with covenants to indemnify the lessee against damages by water from the pipes on the demised premises, creditors, obligees, and covenantees who would not be forever barred of all right to any redress against his property must hasten to the probate court, and prove their claims, *within the 18 months from the giving notice of the order limiting the time to press its claims against the estate.* How can they be proved? Counsel for respondent answers: 'State the particulars of the claim under the provisions of section 104.' But, until a contingent claim becomes absolute, the amount thereof cannot be liquidated, so that it can be allowed by the court, and the amount thereof stated in the order allowing it, as required by section 110.

"But let us assume that, in order to entitle a contingent claim to be allowed, it is not necessary that it should first become absolute and capable of liquidation. Still, we are confronted with the question, how shall it be paid? The statute provides for the payment of all claims which are certain and liquidated, whether due or not due; also for contingent claims which become absolute and capable of liquidation, *within the 18 months allowed for*

the presentation and proof of claims, for, if they become absolute within the limited time, they can be paid as other claims; but, for claims which are contingent when this time expires, there is absolutely no provision of the statute for their payment, or provision for retaining in the control of the court any funds to pay them in the future in case they become absolute, or for suspending the settlement of the estate until that event occurs, if ever."

66 Minn. 246, *State vs. Probate Court of Rock Co.*, arose on certiorari to review an order of the probate court adjudging relator guilty of contempt in not obeying an order for the appointment of an agent on whom service might be made of a summons of the district court of said county in an action in the district court to determine a claim against the estate, the relator being a non-resident executor and the claim being for the non-payment of subscription to stock of a Minnesota corporation —a local contract. All the court decided was that the district court did not have jurisdiction, as the claim was not contingent and could be proved in the probate court. The presentation of the claim within the time prescribed by the probate court was not at issue.

78 N. W. Rep. 95, *Fitzhugh vs. Harrison,* was an appeal from the probate court of St. Louis county from a claim allowed against the estate, arising on a contract made and to be performed in the county. The contention of appellant was that because it was contingent, the probate court had no jurisdiction. The supreme court held that the claim was

not a contingent one and the probate court had jurisdiction. There was no issue in the case as to the presentation of claim.

63 Fed. Rep. 208, *Walker vs. Brown.* The opinion was written by Judge Thayer, who wrote the opinion in the case at bar in the court of appeals. The issue in said cause was, Can a suit in equity be maintained on a purely legal demand? We fail to find anything in the case bearing out the contention of plaintiff in error.

4 Howard, 498, *Aspin vs. Nixon.* The only matter at issue was, Did a decree of the chancery court in England constitute an estoppel in the United States courts of Pennsylvania? Under the circumstances of that case the court said it did not and, incidentally, used the language quoted in brief of plaintiff in error. Such language would be applicable if in the case at bar defendant in error sought to disturb the assets of the estate in the hands of the probate court. But such is not the case.

5 Peters, 523, *Smith vs. Union Bank.* The only issue was the classification and priority of debts, and the court held the *classification* of the state in which the estate was being administered controlled.

76 U. S. 754, *Walker vs. Walker's Executors.* The language quoted in the brief was used relative to an objection that suit should have been brought in Rhode Island where deceased had his domicile and where his estate was insolvent, rather than

in Massachusetts where ancillary administration was obtained and the estate was not insolvent. All that the court determined was that plaintiff was entitled to share in the estate equally with the Massachusetts creditors.

113 U. S. 449, *Morgan vs. Hamlet.* The Arkansas statute differs essentially from the Minnesota statute. The former makes an absolute limitation of two years; the latter, a limitation of eighteen months. Anything less than eighteen months is a limitation not by statute but by order of the court. This action was brought before the expiration of eighteen months.

132 U. S. 484, *Rio Grande R. Co. vs. Gomila*, 10 Sup. Ct. Rep. 155. All this court decided was that property of a debtor brought within the jurisdiction of the circuit court of the United States by seizure under process issued out of that court, remained in its custody to apply in satisfaction of a judgment, notwithstanding the subsequent death of the judgment debtor and probate proceedings in the state of his domicile, saying:

"The rule prevailing, as stated in *Hyde vs. Stone*, 30 Howard, 170, that the jurisdiction of the United States over controversies between citizens of different states, cannot be impaired by the laws of the state which prescribe modes of redress in their courts or which regulate the distribution of their judicial powers."

172 U. S. 358, *M., K. & T. Trust Co. vs. Krumseig*, was an action on note and defense of usury interposed. All that this court decided was that usury being a statutory defense, the federal courts deal-

ing with such questions must look to the laws of the state where the transaction took place. It was an intermediate right which was virtually written into the contract, being a law of the state in which the contract was made and where it was to be executed.

103 U. S. 559, *Ouachita County vs. Wolcott.* This court placed the decision on the ground that a proceeding was pending in the state court against the holder of county warrants which were non-negotiable instruments. Such holders of warrants assigned them to plaintiff who then commenced action in the federal court, while the proceedings in the state court were still pending. All that the case decides is that the law of Arkansas is a part of the contract of a county warrant and to be read into the contract, and when proceedings are commenced against citizens of Arkansas according to the provisions of said law, such proceedings cannot be rendered nugatory by assigning the warrants to a non-resident and such non-resident commencing action in the federal court.

72 U. S. 419, *Ewing vs. City of St. Louis.* The court held only that plaintiff had an adequate remedy at law by writ of certiorari in the state court, and for that reason an action in equity would not lie in the federal court. No principle involved therein is involved in the case at bar.

80 U. S. 243, *Ex parte McNeal.* We cannot understand in what respect the above case is at all applicable to the case at bar. The court simply de-

termined that a licensed pilot was entitled to the fees prescribed by statute of New York, whether he brought action in the state court or in the federal court. That is to say, that the measure of damage was the same in whatever court the action should be brought.

It is not improper, we think, for us to say that this case was tried in the circuit court by Judge William Lochren, who, for more than twenty years before he was appointed to the federal bench, was judge of the district court of the state, than whom there is no man in this state more familiar with the statute law of the state of Minnesota; that Judge Walter Sanborn of the circuit court of appeals, Eighth circuit, from the time of his admission to the bar until his appointment to his present position, practiced in the courts of this state and is most intimately acquainted with the decision of the courts of the state and the policy of its laws.

The case was most carefully considered by the circuit court, most thoroughly investigated by the circuit court of appeals, and we suggest that the construction of the statute laws of their own state by such eminent judges, is entitled to much weight.

We respectfully submit that the judgment of the circuit court and of the circuit court of appeals should be affirmed.

EDWARD C. STRINGER,
McNEIL V. SEYMOUR,
Attorneys for Defendant in Error.